Supreme Court, U.S.
FILED

10-723 NOV 23 2010

OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

STEVEN CARL GREY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

BRISTOL MYERS
Counsel of Record
BRISTOL MYERS & ASSOC., P.C.
1306 EAST SEVENTH STREET
AUSTIN, TEXAS 78702
512-478-2100
bristol@bristolmyerslaw.com

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

Whether Due Process precludes instructing a jury to consider a lesser-included offense that is not rationally supported by the evidence adduced at trial.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdictional Statement 1

Constitutional Provision 2

Statement of the Case 2

Reasons for Granting Review 5

Conclusion 10

TABLE OF AUTHORITIES

Federal Cases

Beck v. Alabama
447 U.S. 625, 100 S.Ct. 2382
65 L.Ed.2d 392 (1980) 7-8

Keeble v. United States
412 U.S. 205, 93 S.Ct. 1993
36 L.Ed.2d 844 (1973) 9

Roberts v. Louisiana
428 U.S. 325, 96 S.Ct. 3001
49 L.Ed.2d 974 (1976) 7-8

Texas Cases

Arevalo v. State
943 S.W.2d 887(Tex. Crim. App. 1997) 5-7

Royster v. State
622 S.W.2d 442 (Tex. Crim. App. 1981) 6-7

Federal Constitution

United States Const., Amend XIV § 1 2

Federal Statutes

28 U.S.C. § 1257(a) 1

Texas Statutes

Tex. Penal Code § 1.07(a)(17)(B) 3

Tex. Penal Code § 22.01(a)(1) 3

Tex. Penal Code § 22.02(a)(2) 3

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Third District, at Austin on direct appeal (App., *infra*, A-29) is reported at 269 S.W.3d 785. The Court of Criminal Appeals of Texas granted discretionary review, and its opinion on the merits (App., *infra*, A-13) is reported at 298 S.W.3d 644.

The opinions of the Texas Court of Appeals, Third District, at Austin on remand (App., *infra*, A-3 and A-9) are unreported. The Court of Criminal Appeals of Texas denial of additional discretionary review (App., *infra*, A-2) is unreported.

JURISDICTION

The Court of Criminal Appeals of Texas decided the federal question at issue in this case in its original opinion on November 18, 2009. This case was remanded to the intermediate appellate court for resolution of an alternative argument regarding lesser-included offenses, as well as an issue of jurisdiction that was decided according to state law.

The Court of Criminal Appeals of Texas denied the Petitioner's request for discretionary review as to these two additional issues on August 25, 2010. No rehearing was requested. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Steven Grey was tried on a felony indictment for aggravated assault, alleging he:

> intentionally, knowingly and recklessly cause[d] bodily injury to Heather Dukes by use of a deadly weapon, to wit: his hand, which in the manner of its use or intended use was capable of causing serious bodily injury or death, by strangling the said Heather Dukes with the Defendant's hand.

See Tex. Penal Code §§ 22.01(a)(1), 22.02(a)(2), 1.07(a)(17)(B).

Just before midnight on July 3, 2006, Grey drove to the residence of Heather Dukes to discuss her relationship with his girlfriend, Desiree Hawken. An argument ensued which escalated into a physical confrontation. At trial, both parties to the fight pointed to each other as the initial aggressor. Grey admitted seizing Dukes by the neck in order to impair her circulation and make her dizzy, but said he did so in self-defense.

In addition to Grey's admission, Dukes testified Grey choked her to the point of blacking out. The police officer to whom Dukes reported the incident noted that she spoke with a raspy voice and had strangulation marks on her neck. A paramedic who treated Dukes also noted strangulation marks on her neck, as well as petechia consistent with strangulation.

The trial court's jury charge authorized the Petitioner's conviction for aggravated assault using language that tracked the indictment, and it also authorized an acquittal if the jury found that he acted in self-defense.

Other than the fact that Dukes did not actually die or suffer serious bodily injury, there was no evidence presented that Grey did not use his hand to strangle Dukes in a manner capable of causing either result. In other words, there was no

evidence showing that Grey's hand was anything less than a deadly weapon in this case.

Nevertheless, the trial court also instructed the jurors that if they found that the Petitioner was not guilty of aggravated assault, they were authorized to convict him for the lesser-included offense of assault if they found that he "intentionally, knowingly and recklessly cause[d] bodily injury, but did not use his hand as a deadly weapon during the commission of the offense to Heather Dukes as he strangled her."

Defense counsel objected to the inclusion of the lesser-included offense of assault in the jury charge as follows:

> I would object to the lesser-included offense of misdemeanor assault being included. The reason is because of the strangled. There is no definition. The definition is to cause death. A lesser included is we strike elements or facts in and see if we have another lesser offense. We strike deadly weapon, well, now we have strangled indicating death of a misdemeanor.

(App., *infra*, A-15, 37)

The objection was overruled, and the jury convicted Grey of the lesser-included offense of assault.

On direct appeal, the Texas Court of Appeals, Third District at Austin, reversed and remanded for a new trial, relying on higher court precedent set in *Arevalo v. State*, 943 S.W.2d 887 (Tex. Crim. App. 1997), because there was no evidence that Grey's hand was *not* used as a deadly weapon; submission of the lesser-included offense did not provide the jury a valid, rational alternative to the offense for which he was placed on trial; and Grey was found guilty of a crime not proven by the evidence.

The State of Texas petitioned for and received discretionary review from the Court of Criminal Appeals of Texas for the sole purpose of overruling its opinion in *Arevalo*. After doing so, the case was remanded to the Texas Court of Appeals, Third District at Austin resolve two other issues raised on direct appeal. The trial court judgment was affirmed, and the Court of Criminal Appeals of Texas refused Grey's request for discretionary review.

REASONS FOR GRANTING THE PETITION

The Court should review this case because the court of last resort for criminal cases in Texas has decided a question of federal law that this Court has not yet settled.

The unsettled question of federal law at issue in this petition is: does Due Process govern the submission of lesser-included offenses to juries in non-capital cases?

For decades in Texas, in order for a defendant to obtain a jury instruction on a lesser-included offense, there had to be some evidence at trial that that the defendant was guilty only of the lesser-included offense. *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981). In *Arevalo v. State*, 943 S.W.2d 887 (Tex. Crim. App. 1997), the Texas Court of Criminal Appeals made it clear that this requirement applied regardless of whether the prosecution or defense was requesting inclusion of the lesser offense instruction.

The basis for this requirement of some evidence that the defendant was "guilty only" of the lesser offense was to prevent juries from returning "compromise" or otherwise unwarranted or irrational verdicts based on something other than the evidence presented at trial in accordance with the rule of law. *Id.* at 889-890.

The core constitutional concern of Due Process is safeguarding citizens from the basic unfairness of deprivation of life, liberty, or property, not through the application of law and legal processes, but by the whims of arbitrary and capricious decision-makers. Next to preventing the erroneous conviction of the innocent and the justified, Due Process must also ensure that, where an accused is to be convicted, the conviction is limited to what the evidence has proven, and nothing more.

This Court has previously invoked the Fourteenth Amendment to undo statutory schemes

that substantially increase the risk of error in the fact-finding process.

In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), this Court held that a death sentence could not be constitutionally imposed where the jury was not instructed on a lesser-included non-capital offense when the evidence would have supported such a verdict.

The Court acknowledged "the nearly universal acceptance" of state and federal courts entitling defendants to jury instructions on lesser-included offenses when merited by the evidence. The Court also found that such broad approval "establishes the value to the defendant of this procedural safeguard." *Id.* at 447 U.S. 637, 100 S.Ct. 2389.

The court held that a state law preventing submission of a lesser-included offense instruction that was supported by the evidence enhanced the risk of unwarranted conviction, and therefore, violated the mandates of Due Process. *Id.* at 447 U.S. 638, 100 S.Ct. 2390.

On the other hand, this Court has also invoked Due Process to prevent unwarranted submission of lesser-included offenses, much like the Texas had under *Royster* and *Arevalo*, *supra*.

In *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), the Court struck down a state law that required submission of several lesser-included offenses to capital juries even if there

was not a scintilla of evidence to support a verdict on a lesser charge. The Court found that such a system injected an "element of capriciousness" into the jurors' power, and "invites the jurors to disregard their oaths." *Id.* at U.S. 335, S.Ct. 3007.

The synthesis of this Court's holdings in *Roberts* and *Beck*, is that juries must be instructed on lesser-included offenses only when there is some evidence to support a conviction on the lesser-included offenses.

Because this Court has explicitly refrained from deciding whether or not Due Process entitles defendants in non-capital cases to the same procedural safeguards, *Beck* at 447 U.S. 638, 100 S.Ct. 2390, n. 14, the Texas Court of Criminal Appeals overruled its opinion in *Arevalo*. *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009).

There now exists an uneven playing field in every Texas court as a result of this case. Prosecutors get lesser-included instructions regardless of the evidence. Defendants are permitted such instructions only when there is some evidence that they are "guilty only of the lesser offense."

Prosecutors will argue that this disparity of positions is warranted because sometimes juries may not want to believe one particular element of the greater offense (for example, that a hand could be a deadly weapon), and therefore, they need the fallback of a lesser-included offense. That was the

argument advanced by the Texas Court of Criminal Appeals in this case. This was also the construct, rejected in *Roberts*, for allowing the jury to act capriciously, though the Louisiana law in that case was at least fair because each side was entitle to a lesser-included instruction every time, in every case, regardless of which side made the request.

The absurdity of the Texas Court of Criminal Appeals ruling is that in this very case, Steven Grey would not have been legally entitled to the lesser-included offense instruction (under which he was convicted) if he had begged for it.

Allowing the prosecution to request lesser-included offenses regardless of the evidence also encourages prosecutorial overreaching—deliberately using charges on the greater offense (regardless of the actual strength of the case) to "forum shop" or to instill fear into a defendant in hopes of settling a plea to a lesser charge. The potential for overreaching was noted in *Keeble v. United States*, 412 U.S. 205, 214, 93 S.Ct. 1993, 1999, 36 L.Ed.2d 844 (1973), n. 14. Somewhat less nefarious, yet still unwholesome, because a prosecutor can always rely on getting a lesser-included offense instruction at trial, there is less incentive for that prosecutor to exercise any discretion pre-trial to dispose of weak cases fairly.

Lastly, as happened in this case, submission of a lesser-included offense not based on evidence hampers a fair determination of the facts when a defendant raises an affirmative defense.

Here, Grey admitted the act and the mental state required to convict of aggravated assault: purposefully grabbing Dukes around the neck. His defense was that he was justified in doing so, and the jury was instructed accordingly. Injection by the prosecution of the lesser-included misdemeanor assault—when the issue was not what happened or to what degree—took away from a fair determination of the self-defense issue.

Standards are needed to level the playing field and to ensure evidence-based decision-making when it comes to instructing juries on lesser-included offenses in non-capital cases. Basic standards are already clearly in place in capital cases like *Beck* and *Roberts* under the aegis of Due Process, whose reach needs and merits review and extension.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRISTOL MYERS
Counsel of Record
BRISTOL MYERS & ASSOC., P.C.
1306 EAST SEVENTH STREET
AUSTIN, TEXAS 78702
512-478-2100
bristol@bristolmyerslaw.com

APPENDIX
TABLE OF CONTENTS

Order of the
Court of Criminal Appeals of Texas
Denying Petition for Discretionary Review ... A-2

Opinion of the
Court of Appeals of Texas
Third District at Austin
on Remand—Rehearing A-3

Opinion of the
Court of Appeals of Texas
Third District at Austin
on Remand A-9

Opinion of the
Court of Criminal Appeals of Texas
on Petition for Discretionary Review A-13

Opinion of the
Court of Appeals of Texas
Third District at Austin
on Direct Appeal A-29

OFFICIAL NOTICE FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

Wednesday, August 25, 2010

Re: Case No. PD-0734-10

COA#: 03-07-00610-CR

STYLE: GREY, STEVEN

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

TEXAS COURT OF APPEALS, THIRD DISTRICT,
AT AUSTIN

ON REMAND

NO. 03-07-00610-CR

Steven Grey, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS
COUNTY, 22ND JUDICIAL DISTRICT
NO. CR-07-144, HONORABLE WILLIAM HENRY,
JUDGE PRESIDING

MEMORANDUM OPINION

We withdraw the opinion and judgment on remand filed March 2, 2010.

Appellant Steven Grey was tried on an indictment accusing him of aggravated assault. Over appellant's objection, the trial court instructed the jury on the lesser included offense of simple assault, and the jury convicted appellant of the lesser offense. Following a rule first announced in *Arevalo v. State*, 943 S.W.2d 887, 890 (Tex. Crim. App. 1997), we held

on original submission that the trial court reversibly erred by charging the jury on the lesser included offense because there was no evidence that appellant was guilty only of the lesser offense. *Grey v. State*, 269 S.W.3d 785, 789 (Tex. App.--Austin 2008). On the State's petition for discretionary review, the court of criminal appeals overruled *Arevalo*, reversed this Court's judgment, and remanded the cause to us to address appellant's two remaining points of error. *Grey v. State*, 298 S.W.3d 644, 651 (Tex. Crim. App. 2009).

In point of error two, appellant contends that the trial court did not have jurisdiction to render a judgment of conviction for misdemeanor assault. When the jurisdiction of a district court is properly invoked to try a felony indictment, that court is authorized to proceed to judgment on any lesser included offense supported by the evidence, even if the lesser offense is a misdemeanor. *See* Tex. Code Crim. Proc. Ann. art. 4.06 (West 2005), art. 37.08 (West 2006); *Cunningham v. State*, 726 S.W.2d 151, 153 (Tex. Crim. App. 1987). The indictment in this cause alleged that appellant caused bodily injury to the complainant by strangling her with his hand, and that this assault was aggravated by appellant's use of his hand as a deadly weapon. *See* Tex. Penal Code Ann. §§ 22.01(a)(1), .02(a)(2) (West Supp. 2009). The district court authorized appellant's conviction for misdemeanor assault if the jury found that he caused bodily injury as alleged but that his hand was not a deadly weapon. We held on original submission that this lesser assault was included within the aggravated bodily injury assault alleged

in the indictment. *Grey*, 269 S.W.3d at 788. We also held that the evidence supports appellant's conviction for the lesser offense. *Id.* at 790. Accordingly, we further hold that the trial court had jurisdiction to render judgment on the jury's verdict convicting appellant of misdemeanor bodily injury assault. Point of error two is overruled.

In his third point of error, appellant contends that the trial court erred by refusing his request for an instruction authorizing his conviction for offensive physical contact. *See* Tex. Penal Code Ann. § 22.01(a)(3). A trial court must instruct on a lesser included offense, and therefore errs by refusing to do so, only if there is evidence that would permit a jury to rationally find that the defendant is guilty of the lesser included offense but not the greater offense alleged in the indictment. *Hampton v. State*, 165 S.W.3d 691, 693-94 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). This rule was not altered by the court of criminal appeals' opinion in this cause, which holds only that a trial court has the discretion to charge on a lesser included offense supported by the evidence even when the "guilty only" test is not met. *See Grey*, 298 S.W.3d at 649-50, and at 652 (Hervey, J., concurring).

On original submission, we held that there was no evidence that appellant did not use his hand as a deadly weapon and therefore no evidence that he was guilty only of simple bodily injury assault. *Grey*, 269 S.W.3d at 788-89. Similarly, there is no evidence that appellant did not cause bodily injury to the

complainant when he choked her until she lost consciousness. *See* Tex. Penal Code Ann. § 1.07(a)(8) (West Supp. 2009) (defining "bodily injury"). For these reasons, we hold that there is no evidence that appellant was guilty only of touching the complainant in an offensive manner. The trial court did not err by refusing the requested instruction. Point of error three is overruled.

Following remand, the Court notified the parties that they would be permitted to file supplemental briefs pertinent to appellant's second and third points of error. Appellant filed a supplemental brief reasserting all three of his original points and adding a fourth. Appellant's first point of error was resolved against him by the court of criminal appeals and is not before us. We have considered appellant's supplemental arguments with regard to points of error two and three. In our original opinion on remand, we declined to address appellant's new, supplemental point of error. *See* Tex. R. App. P. 38.7. In a motion for rehearing, appellant urges that the issue he raises in this supplemental point was urged in his original brief on appeal, albeit as part of his first point of error. We will address the supplemental point.

Appellant complains that he was denied due process because the trial court's lesser included offense instruction permitted the jury to convict him of the lesser offense without finding that he engaged in the conduct--strangling the complainant with his hand--alleged in the indictment. The instruction authorized

the jury to convict appellant of simple assault if it found that he:

> intentionally, knowingly, or recklessly cause[d] bodily injury, but did not use his hand as a deadly weapon during the commission of the offense, to Heather Dukes by strangling her.

Appellant asserts that this instruction directed the jury to convict him of the lesser offense if the jury found that he caused bodily injury to the complainant, but did not strangle her with his hand.

Appellant's reading of the instruction overlooks the comma that follows "offense" and thus separates "during the commission of the offense" from "to Heather Dukes by strangling her."[1] Although the instruction is perhaps awkwardly worded, we believe that the prepositional phrase "to Heather Dukes by strangling her" modifies the verb phrase "cause[d] bodily injury." So read, the instruction authorized appellant's conviction for the lesser included offense if the jury found that appellant caused bodily injury to the complainant by strangling her with his hand as alleged in the indictment, but that he did not use his hand as a deadly weapon.[2] The supplemental point of error is overruled.

---

[1] When we quoted the instruction on original submission, we also omitted the comma. *See Grey v. State*, 269 S.W.3d 785, 787 (Tex. App.--Austin 2008).

[2] This was also our reading of the instruction on original submission. *See id.* at 787 n.1.

The motion for rehearing is overruled. The judgment of conviction is affirmed.

J. Woodfin Jones, Chief Justice

Before Chief Justice Jones, Justices Pemberton and Waldrop

Affirmed on Remand

Filed: April 8, 2010

Do Not Publish

TEXAS COURT OF APPEALS, THIRD DISTRICT,
AT AUSTIN

ON REMAND

NO. 03-07-00610-CR

Steven Grey, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS
COUNTY, 22ND JUDICIAL DISTRICT
NO. CR-07-144, HONORABLE WILLIAM HENRY,
JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Steven Grey was tried on an indictment accusing him of aggravated assault. Over appellant's objection, the trial court instructed the jury on the lesser included offense of simple assault, and the jury convicted appellant of the lesser offense. Following a rule first announced in *Arevalo v. State*, 943 S.W.2d 887, 890 (Tex. Crim. App. 1997), we held on original submission that the trial court reversibly erred by charging the jury on the lesser included offense because there was no evidence that appellant was guilty only of the lesser offense. *Grey v. State*,

269 S.W.3d 785, 789 (Tex. App.--Austin 2008). On the State's petition for discretionary review, the court of criminal appeals overruled *Arevalo*, reversed this Court's judgment, and remanded the cause to us to address appellant's two remaining points of error. *Grey v. State*, 298 S.W.3d 644, 651 (Tex. Crim. App. 2009).[1]

In point of error two, appellant contends that the trial court did not have jurisdiction to render a judgment of conviction for misdemeanor assault. When the jurisdiction of a district court is properly invoked to try a felony indictment, that court is authorized to proceed to judgment on any lesser included offense supported by the evidence, even if the lesser offense is a misdemeanor. *See* Tex. Code Crim. Proc. Ann. art. 4.06 (West 2005), art. 37.08 (West 2006); *Cunningham v. State*, 726 S.W.2d 151, 153 (Tex. Crim. App. 1987). The indictment in this cause alleged that appellant caused bodily injury to the complainant by strangling her with his hand,

---

[1] Following remand, the Court notified the parties that they would be permitted to file supplemental briefs pertinent to appellant's second and third points of error. Appellant filed a supplemental brief reasserting all three of his original points and adding a fourth. Appellant's first point of error was resolved against him by the court of criminal appeals and is not before us. We have considered appellant's supplemental arguments with regard to points of error two and three. We did not give appellant permission to raise a new point of error. We decline to address this new and untimely point of error, which is not dependent on the court of criminal appeals' analysis or holding. *See* Tex. R. App. P. 38.7.

and that this assault was aggravated by appellant's use of his hand as a deadly weapon. *See* Tex. Penal Code Ann. §§ 22.01(a)(1), .02(a)(2) (West Supp. 2009). The district court authorized appellant's conviction for misdemeanor assault if the jury found that he caused bodily injury as alleged but that his hand was not a deadly weapon. We held on original submission that this lesser assault was included within the aggravated bodily injury assault alleged in the indictment. *Grey*, 269 S.W.3d at 788. We also held that the evidence supports appellant's conviction for the lesser offense. *Id.* at 790. Accordingly, we further hold that the trial court had jurisdiction to render judgment on the jury's verdict convicting appellant of misdemeanor bodily injury assault. Point of error two is overruled.

In his third and final point of error, appellant contends that the trial court erred by refusing his request for an instruction authorizing his conviction for offensive physical contact. *See* Tex. Penal Code Ann. § 22.01(a)(3). A trial court must instruct on a lesser included offense, and therefore errs by refusing to do so, only if there is evidence that would permit a jury to rationally find that the defendant is guilty of the lesser included offense but not the greater offense alleged in the indictment. *Hampton v. State*, 165 S.W.3d 691, 693-94 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). This rule was not altered by the court of criminal appeals' opinion in this cause, which holds only that a trial court has the discretion to charge on a lesser included offense supported by the evidence even when the "guilty only" test is not

met. *See Grey*, 298 S.W.3d at 649-50, and at 652 (Hervey, J., concurring).

On original submission, we held that there was no evidence that appellant did not use his hand as a deadly weapon and therefore no evidence that he was guilty only of simple bodily injury assault. *Grey*, 269 S.W.3d at 788-89. Similarly, there is no evidence that appellant did not cause bodily injury to the complainant when he choked her until she lost consciousness. *See* Tex. Penal Code Ann. § 1.07(a)(8) (West Supp. 2009) (defining "bodily injury"). For these reasons, we hold that there is no evidence that appellant was guilty only of touching the complainant in an offensive manner. The trial court did not err by refusing the requested instruction. Point of error three is overruled.

The judgment of conviction is affirmed.

J. Woodfin Jones, Chief Justice

Before Chief Justice Jones, Justices Pemberton and Waldrop

Affirmed on Remand

Filed: March 2, 2010

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

NO. PD-0137-09

STEVEN GREY, APPELLANT

V.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD COURT OF APPEALS
HAYS COUNTY

KELLER, P.J., DELIVERED THE OPINION OF THE COURT IN WHICH MEYERS, KEASLER, HERVEY AND COCHRAN, JJ., JOINED. HERVEY, J., FILED A CONCURRING OPINION IN WHICH MEYERS, AND KEASLER, JJ., JOINED. COCHRAN, J., FILED A CONCURRING OPINION. JOHNSON, J., CONCURRED. PRICE, WOMACK, AND HOLCOMB, JJ., DISSENTED.

In the *Royster-Rousseau* line of cases, we established a two-pronged test for determining when a trial judge should submit to the jury a lesser-included

offense that is requested by the defendant.[1] Under the second prong of the test, "some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense."[2] In *Arevalo v. State*,[3] this Court held that the second prong applies equally to the submission of lesser-included offenses that are requested by the State. We granted review in this case to determine the following ground presented by the State: "*Arevalo v. State* should be overruled." Agreeing with the State, we overrule *Arevalo* and hold that the State is not bound by the second prong of the *Royster-Rousseau* test.

I. BACKGROUND

Appellant was indicted for aggravated assault by causing bodily injury and using a deadly weapon. The alleged deadly weapon was appellant's hand, used to strangle the victim. In addition to instructions about the indicted offense, the jury charge contained an instruction on the lesser-included offense of simple assault by causing bodily injury. The jury charge was prepared by the prosecutor's office, and one of the prosecutors stated on the record that she had no objection to it and thought it was sufficient. But defense counsel

---

[1] See *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981)(plurality op.); *Rousseau v. State*, 855 S.W.2d 666 (Tex. Crim. App. 1993).

[2] *Rousseau*, 855 S.W.2d at 673.

[3] 943 S.W.2d 887 (Tex. Crim. App. 1997).

objected to the lesser-included offense instruction.[4] The jury found appellant guilty of the lesser-included offense of simple assault.

On appeal, appellant claimed that the submission of the lesser-included offense was error. The court of appeals agreed and reversed the conviction.[5]

II. ANALYSIS

A. Rules for Overruling Precedent

Though it is "[o]ften better to be consistent than right,"[6] precedent may be overruled "if the reasons for doing so are weighty enough."[7] Factors that support the overruling of precedent include:

---

[4] 4. Defense counsel objected as follows:

> I would object to the lesser-included offense of misdemeanor assault being included. The reason is because of the strangled. There is no definition. The definition is to cause death. A lesser included is we strike elements or facts in and see if we have another lesser offense. We strike deadly weapon, well, now we have strangled indicating death of a misdemeanor." After the objection was overruled, defense counsel requested an instruction on the lesser-included offense of Class C misdemeanor assault by offensive touching. That request was denied. The State does not raise before us any claim regarding the sufficiency of appellant's trial objection to the lesser-included offense that was submitted.

[5] *Grey v. State*, 269 S.W.3d 785 (Tex. App.-Austin 2008).

[6] *Malik v. State*, 953 S.W.2d 234, 236 (Tex. Crim. App. 1997).

[7] *Ex parte Lewis*, 219 S.W.3d 335, 338 (Tex. Crim. App. 2007).

(1) that the original rule or decision was flawed from the outset,

(2) that the rule's application produces inconsistent results,

(3) that the rule conflicts with other precedent, especially when the other precedent is newer and more soundly reasoned,

(4) that the rule regularly produces results that are unjust, that are unanticipated by the principle underlying the rule, or that place unnecessary burdens on the system, and

(5) that the reasons that support the rule have been undercut with the passage of time.[8]

B. The Remedy in *Arevalo*

One obvious flaw in the rule laid down by *Arevalo* and its progeny, one that produces inconsistent and unjust results in every single case in which the rule is applied, is the remedy. When a lesser-included offense is submitted in violation of *Arevalo*, and the defendant is convicted of that offense, the remedy this Court has imposed is a remand for a new trial on the very same lesser-included offense that the defendant has just claimed should never have been

---

[8] *Id.*

submitted.[9] Such a result is "illogical," [10] but we fashioned this remedy because alternative remedies seemed unavailable or worse. Because a conviction on the lesser offense operates as an acquittal of the greater offense, [11] retrial on the greater offense is not possible.[12] But an outright acquittal of the criminal charge would be absurd where the evidence was in fact legally sufficient to support a conviction for the lesser-included offense. [13]

C. Source of the Rule in *Arevalo*

1. Constitution?

So where did the rule in *Arevalo* come from, and what is the legal basis for its existence? *Arevalo*'s holding was based upon the "guilty only" requirement that is the second prong of the *Royster-Rousseau* test.[14] In dissents in *Arevalo*, Presiding Judge McCormick and Judge Meyers both suggested that the "guilty only" requirement has constitutional underpinnings, describing when a lesser-included-

---

[9] *Hampton v. State*, 165 S.W.3d 691, 694 (Tex. Crim. App. 2005).

[10] *Hampton v. State*, 109 S.W.3d 437, 442 (Tex. Crim. App. 2003)(Keller, P.J., dissenting).

[11] *Green v. United States*, 355 U.S. 184 (1957); Tex. Code Crim. Proc. art. 37.14.

[12] *Hampton*, 165 S.W.3d at 694; see also Hampton, 109 S.W.3d at 442 (Keller, P.J., dissenting).

[13] *Hampton*, 165 S.W.3d at 694.

[14] See *Arevalo*, 943 S.W.2d at 888-90.

offense instruction is required, but not necessarily describing all the circumstances under which such an instruction is permitted.[15] In *Rousseau*, we had clarified the "guilty only" prong (but did not change existing law) by borrowing language from the federal standard, which we observed was stated in the Supreme Court decision of *Hopper v. Evans* [16] and quoted by the Fifth Circuit.[17] Evans discussed *Beck v. Alabama*, [18] in which the Supreme Court concluded that a failure in a capital case to submit a lesser-included offense when raised by the evidence violates the constitution because there is an unwarranted risk that "a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious [but lesser] crime." [19]

Evans also discussed the plurality opinion of *Roberts v. Louisiana*,[20] which addressed a situation "obverse" to the one at issue in *Beck*, [21] and thus analogous to

---

[15] *Arevalo*, 943 S.W.2d at 890-91 (McCormick, P.J., dissenting); id. at 892 n.2, 893 (Meyers, J., dissenting).

[16] 456 U.S. 605 (1982).

[17] *Rousseau*, 855 S.W.2d at 672-73, 673 n.4; see Evans, 456 U.S. at 612 (quoting the federal rule).

[18] 447 U.S. 625 (1980).

[19] *Evans*, 456 U.S. at 610 (citing *Beck*, 447 U.S. at 642)(bracketed material inserted).

[20] 428 U.S. 325 (1976)(plurality op.).

[21] *Evans*, 456 U.S. at 611.

the Court's holding in *Arevalo*. In *Roberts*, a Louisiana statute required the submission in a capital case of lesser-included offenses "even if there was not a scintilla of evidence to support the lesser verdicts." [22] The practice was impermissible because "it invited the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first-degree murder, inevitably leading to arbitrary results." [23]

Evans, *Beck*, and *Roberts* were all capital cases. The Supreme Court expressly reserved the question of whether the federal constitution can require the submission of a lesser-included offense in a non-capital case, [24] and more recently it has suggested that *Beck*'s holding may be limited to cases in which the death penalty was automatic upon conviction for the greater offense. [25] We have assumed that the erroneous failure to submit a lesser-included-offense instruction requested by the defense in a non-capital case constitutes ordinary jury charge error under *Almanza v. State* [26] to be analyzed for some harm

---

[22] *Evans*, 456 U.S. at 611 (quoting *Roberts*, 428 U.S. at 334).

[23] *Id.* (citing *Roberts*, 428 U.S. at 335).

[24] *Beck*, 447 U.S. at 638 n.14; see also *Howell v. Mississippi*, 543 U.S. 440, 444-45 (2005).

[25] *Howell*, 543 U.S. at 445.

[26] *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

when error was preserved.[27] *Almanza*'s "some harm" standard applies only to non-constitutional errors,[28] and in any event, we used a "*Beck*-like" rationale to assess harm rather than holding that *Beck* controls the case.[29]

The arguable relevance of *Roberts* to Texas jurisprudence is far more tenuous. The *Roberts* opinion found arbitrariness in the context of a scheme that automatically imposed the death penalty upon conviction for first-degree murder.[30]The submission of lesser-included offenses was the only method by which the jury was given the discretion to determine whether a convicted defendant would receive the death penalty, and the Supreme Court held that such a method did not provide sufficient guidance.[31] In *Lesko v. Lehman*, the Third Circuit distinguished Roberts on the basis of this factual context and rejected a defendant's claim that constitutional error resulted from the submission of a lesser-included offense that was not raised by the evidence.[32] "[A]ssuming arguendo that

---

[27] *Saunders v. State*, 913 S.W.2d 564, 570-72 (Tex. Crim. App. 1995).

[28] *Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000).

[29] *Saunders*, 913 S.W.2d at 571 n.3.

[30] *Roberts*, 428 U.S. at 336.

[31] *Id.* at 335.

[32] 925 F.2d 1527, 1552-53 (3d Cir. 1991).

the trial evidence could not support a voluntary manslaughter verdict, we do not believe that the fact that the court instructed on that offense violates the rationale of *Roberts*." [33] The submission of the lesser offense did not violate *Roberts* because the death penalty was not mandatory, the jury was permitted to consider the full range of mitigating evidence, there were standards to guide the jury's sentencing discretion, and meaningful appellate review was available. [34]

2. Statute?

Though the Court's opinion in *Arevalo* cited to articles 37.08 and 37.09,[35] neither statute contains any language that suggests the application of a "guilty only" requirement for determining when a lesser-included offense should be submitted.[36] One

---

[33] *Id.* at 1553.

[34] *Id.*; see also *McDougall v. Dixon*, 921 F.2d 518, 531-32 (4th Cir. 1990)(distinguishing *Roberts* on the basis that there was evidence upon which a jury could have returned a verdict on the lesser offense and North Carolina did "not have a mandatory death sentence for first degree murder as Louisiana had at the time of Roberts").

[35] See *id.* at 888 (citing Tex. Code Crim. Proc. arts. 37.08, 37.09).

[36] Art. 37.08 provides: "In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." Art. 37.09 provides:

> An offense is a lesser included offense if:

could argue that a lesser-included offense does not become "law applicable to the case" under Article 36.14[37] unless it is raised by the evidence. But such an argument begs the question of what it means for a lesser offense to be "raised by the evidence." The propriety of the "guilty only" requirement appears to be a matter of common law,[38] which will be discussed in more detail below.

D. The Reasoning Behind the Rule in *Arevalo*

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

[37] See Tex. Code Crim. Proc. art. 36.14 ("the judge shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case").

[38] See Tex. Code Crim. Proc. art. 1.27 ("If this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern.").

The "guilty only" requirement was originally articulated by this Court in *Daywood v. State*.[39] The only reasoning given for this requirement was that it had to be met to "raise[] the issue" of the lesser-included offense.[40] In *Arevalo*, this Court conceded that we had "never stated a rationale for the second prong of the [*Royster-Rousseau*] test," but we "thought the rationale was obvious."[41] We said that the "guilty only" rule was designed to preserve the integrity of the jury as a factfinder by ensuring that it was instructed on a lesser-included offense "only when that offense constitutes a valid, rational alternative to the charged offense."[42]

The Court in *Arevalo* then made an inferential leap: It held that this rationale "is as applicable to the State's request for a lesser-included offense as it is to a defendant's request."[43] Why? Because a lesser-included-offense instruction "must not constitute an invitation to the jury to reach an irrational verdict."[44]

---

[39] 157 Tex. Crim. 266, 269, 248 S.W.2d 479, 481 (Tex. Crim. App. 1952).

[40] *Id.*

[41] *Arevalo*, 943 S.W.2d at 889 (bracketed material substituted for original).

[42] *Id.*

[43] *Id.* at 889-90.

[44] *Id.* at 890.

But the Court did not ask or answer the next obvious question: How does a lesser-included-offense instruction invite a jury to reach an irrational verdict? If the lesser offense is viewed in isolation, a jury's verdict would be rational so long as the lesser offense is included in the charging instrument and supported by legally sufficient evidence.[45] The "guilty-only" prong of the *Royster-Rousseau* test requires, however, that we view the rationality of the lesser offense, not in isolation, but in comparison to the offense described in the charging instrument. But why should we make that comparison? The answer must be that the State is entitled to pursue the charged offense and, therefore, is entitled to receive a response from the jury on whether the defendant is guilty of the charged offense. Is the defendant similarly entitled to a response from the jury on the charged offense? The answer to that question is clearly no. It is the State, not the defendant, that chooses what offense is to be charged. In fact, the State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense. [46] If the State can abandon the charged offense in favor of a lesser-included offense, there is no logical reason why the State could not abandon its unqualified pursuit of the charged offense in favor of a qualified pursuit that includes the prosecution of a lesser-included offense in the alternative.

---

[45] See *Wasylina v. State*, 275 S.W.3d 908, 909-10 (Tex. Crim. App. 2009).

[46] *Eastep v. State*, 941 S.W.2d 130, 134 (Tex. Crim. App. 1997).

E. The Consequences of the Rule in *Arevalo*

We have already addressed one detrimental consequence of the rule in *Arevalo*: the remedy for the supposed error is illogical. Another detrimental consequence is that the prosecutor may be faced with a situation in which any decision he makes carries a high risk of error. If the prosecutor requests a lesser-included offense, he may run the risk of a reversal under *Arevalo*. But if the prosecutor fails to request a lesser-included offense, he may also run the risk of an outright acquittal by a jury or an acquittal for legal insufficiency on appeal.[47]

The present case is illustrative. To convict appellant of aggravated assault in this case, the State had to prove that he used or exhibited a deadly weapon.[48] The alleged deadly weapon in this case was appellant's hand. The court of appeals held that the evidence in this case does not show that the defendant was guilty only of a simple assault because the evidence shows only that the defendant's hand was a deadly weapon.[49] But it is easy to see

---

[47] See *Collier v. State*, 999 S.W.2d 779, 790 (Tex. Crim. App. 1999)(Keller, J., dissenting); id. at 794 (McCormick, P.J., dissenting on motion for rehearing); *Haynes v. State*, 273 S.W.3d 183 (Tex. Crim. App. 2008)(reformation to lesser-included offense not permitted when the lesser-included offense is not submitted and the prosecutor failed to request its submission).

[48] See Tex. Pen. Code §22.02(a)(2).

[49] *Grey*, 269 S.W.3d at 788-89.

how a jury might not be willing to find that a person's hand is a deadly weapon, despite all the evidence in favor of that proposition. And at the time of trial, the State might have legitimately perceived the possibility (though unlikely) that an appellate court would decide that the evidence was legally insufficient to prove the deadly weapon element.

Arevalo's application is not limited to cases in which the prosecutor is uncertain how a jury or an appellate court will view the strength of the State's case.[50] There can be a legitimate dispute about the meaning of the language of the aggravating element that distinguishes the charged offense from the lesser-included offense, [51] or the possibility could exist that the aggravating element renders the

---

[50] For an example of a dispute about the strength of the State's case, see *Laster v. State*, 275 S.W.3d 512, 523-24 (Tex. Crim. App. 2009), and id. at 528-533 (Cochran, J., dissenting). Judge Cochran noted that, if her view were correct, the conviction could be reformed to reflect a lesser included offense that was submitted to the jury, with a remand for resentencing. Id. at 533, 533 n.40 (Cochran, J., dissenting).

[51] See *Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007)(felony DWI can be an underlying offense for felony murder) and id. at 311 n.31 (because lesser offense of felony DWI was submitted, judgment could have been reformed to lesser offense if felony murder conviction had been set aside); *Haynes v. State*, 254 S.W.3d 466, 469-70 (Tex. App.-Houston [1st Dist.] 2007)(rejecting State's contention that the definition of "household" in Tex. Fam. Code §71.006 applies to prosecutions under Tex. Penal Code §22.01(b)(2)) and *Haynes*, 273 S.W.3d at 185, passim (lesser-included offense of assault was not submitted, so no reformation possible).

charged offense unconstitutional.[52] And with respect to disputes about the meaning of statutory language, appellate interpretations of statutes are not always foreseeable and can even involve the overruling of precedent.[53]

The cautious approach for the prosecutor to take would be - or at least should be - to request the lesser-included offense. Allowing submission of lesser offenses when requested by the prosecutor would serve at least two important interests. First, society has an interest in convicting and punishing people who are guilty of crimes. When, in the prosecutor's judgment, submission of the lesser-included offense will enhance the prospects of securing an appropriate criminal conviction for a defendant who is in fact guilty, society's interests are best served by allowing the submission. Second, the prosecutor has "the primary duty . . . not to convict, but to see that justice is done."[54] Even if the prosecutor believes in a given case that he will secure a conviction on the charged offense if the only

---

[52] See *Long v. State*, 931 S.W.2d 285, 294 (Tex. Crim. App. 1996)(element distinguishing stalking from lesser offense rendered stalking offense unconstitutional).

[53] See *Roberts v. State*, 273 S.W.3d 322, 330-31, 332 (Tex. Crim. App. 2008)(overruling holding in *Norris v. State*, 902 S.W.2d 428 (Tex. Crim. App. 1995), regarding the proper use of transferred intent and reforming judgment to reflect conviction for lesser-included offense of murder and remanding for resentencing).

[54] Tex. Code Crim. Proc. art. 2.01; *Haynes*, 273 S.W.3d at 191 (Johnson, J., concurring).

alternative is acquittal, he might also believe that the jury should be given the option to decide whether a conviction on the lesser offense is more appropriate.

Of course, the prosecutor could simply abandon the charged offense in favor of the lesser-included offense.[55] But doing so would reflect not caution but capitulation. If the prosecutor believes the evidence for the charged offense is strong but also believes that the jury ought to be able to consider the lesser-included offense, then abandoning the charged offense as a remedy for the dilemma created by *Arevalo* would be overkill. And the decision on whether to abandon the charged offense would itself pose a dilemma because the prosecutor would not want to effectuate an abandonment unnecessarily.

F. Conclusion

The common-law rule established in *Arevalo* is based on flawed premises, places undue burdens on the prosecutor, and results in an illogical remedy. Consequently, we overrule *Arevalo*.

The judgment of the court of appeals is reversed, and the case is remanded to address appellant's remaining points of error.

Delivered: November 18, 2009

Publish

---

[55] See *Eastep*, cited above.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-07-00610-CR

Steven Grey, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 22ND JUDICIAL DISTRICT NO. CR-07-144, HONORABLE WILLIAM HENRY, JUDGE PRESIDING

OPINION

Appellant Steven Grey was tried on an indictment accusing him of aggravated assault. The jury returned a verdict convicting him of the lesser offense of simple assault, and the trial court assessed punishment at one year in jail. Because we agree with appellant that the trial court erred by submitting the lesser offense to the jury, we will reverse the conviction and remand for a new trial.

Shortly before midnight on July 3, 2006, appellant drove to the residence of the complainant, Heather Dukes, to discuss Dukes's relationship with

appellant's girlfriend, Desiree Hawken. The conversation, which turned into a confrontation, took place in Dukes's front yard. Dukes testified that she asked appellant to leave when he began speaking to her in "an aggressive manner." Dukes said that when she then turned to enter the house, appellant said, "No, you will listen to this," seized her by her upper arms, and pushed her against the door frame. Dukes testified that she was "really scared" and began to struggle. She managed to free her right arm and attempted to hit appellant without success. Dukes said, "He [then] took his left arm, the one he was holding my right which I had gotten free from, and he took his hand around my throat and then he clinched and then he pushed me up against the doorframe." Dukes testified that she continued trying to hit appellant, but "I could barely even touch him. He started hitting me." She added, "He started pounding his fist into my eye while he was choking me. I was still pressed up against the doorframe." Dukes recounted, "I couldn't breathe. . . . I felt my body getting numb. My knees buckled and I don't remember anything, everything went black." At some point, Dukes and appellant lost their balance and fell from the front porch onto the ground.

Dukes's friend, Lindsey Boyd, was also present and witnessed the fracas. Her testimony describing appellant's conduct was similar to Dukes's.

Dukes did not call the police or seek medical attention that night. Instead, she went to the San Marcos police station the following morning and

reported that she had been assaulted. Officer Danny Fisher testified that Dukes was emotionally distraught, had a bruised and swollen eye, and spoke with a raspy voice. Dukes told Fisher that she had been strangled by hand and "[a]t some point she stated that she was strangled with a necklace that she was wearing." Fisher said that he observed a fingerprint or thumb print on one side of Dukes's neck, and on the other side there was an outline of the necklace.

Paramedic Erik Olufs testified that he treated Dukes at the police station that morning. Olufs said that Dukes had a hematoma on her left eye, and petechial spotting and ligature marks on her neck. Olufs described the ligature marks as "having a necklace and pulling on it or something like that." He testified that the petechia were "likely caused by either a blunt trauma or by strangulation." Olufs testified that Dukes was unable to fully open her mouth due to "pain that led back to the back of her neck from her jaw." He characterized her injuries as "significant." Photographs of Dukes showing her injuries were introduced in evidence.

Appellant did not testify, but a written statement he gave to the police was admitted in evidence. In the statement, appellant said that when Dukes told him to leave her residence, he grabbed her wrist to get her attention. According to appellant, Dukes "responded by shoving me." Appellant said that Dukes then "reached up and grabbed me by the throat with her left hand . . . and began punching me in the face with her right." Appellant said that he

"reached up and grabbed her neck, applying pressure to her pulse points with my thumb and two foremost fingers. My intention was to make her dizzy so she would be knocked off balance. I began striking her with my right hand in the face in the exact manner she continued to assault me." According to the statement, Dukes "staggered back" after appellant hit her four to six times, and they both fell from the porch. Appellant also sought to establish that Dukes had thrown the first punch through his cross-examination of the State's witnesses.

The indictment alleged that appellant:

> intentionally, knowingly and recklessly cause[d] bodily injury to Heather Dukes by use of a deadly weapon, to wit: the defendant's hand, which in the manner of its use or intended use was capable of causing serious bodily injury or death, by strangling the said Heather Dukes with the defendant's hand.

See Tex. Penal Code Ann. §§ 22.01(a)(1), .02(a)(2) (West Supp. 2008). The court's charge authorized appellant's conviction for aggravated assault using language that tracked the indictment. In addition, and over appellant's objection, the court instructed the jurors that if they found that appellant was not guilty of aggravated assault as alleged, they were authorized to convict him for the lesser offense of simple assault if they found that he:

> intentionally, knowingly, or recklessly cause[d] bodily injury, but did not use his hand as a deadly weapon during the commission of the offense to Heather Dukes by strangling her.[1]

In his first point of error, appellant contends that it was error for the court to authorize his conviction for simple assault because there was no evidence that would permit the jury rationally to find that he was guilty only of this lesser offense.

A two-pronged test must be met before a jury may be charged on a lesser included offense: (1) the lesser offense must be included within the proof necessary to establish the greater offense for which the defendant is on trial, and (2) there must be some evidence in the record that would permit a jury to rationally find that the defendant is guilty of the lesser offense but not the greater offense. *Hampton v. State*, 165 S.W.3d 691, 693-94 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). Both prongs of this test apply regardless of whether the instruction is requested by the defendant or by the State. *Hampton*, 165 S.W.3d at 694; *Arevalo v. State*, 943 S.W.2d 887, 890 (Tex. Crim. App. 1997).

---

[1] We understand this instruction to authorize appellant's conviction if the jury found that he strangled the complainant with his hand, but that he did not use his hand as a deadly weapon.

In determining whether a lesser offense is included within the proof necessary to establish the greater offense, we compare the statutory elements of the greater offense as they were alleged and modified in the indictment with the elements of the potential lesser included offense. *Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007). The indictment in this case alleged that appellant caused bodily injury to Dukes by strangling her with his hand, and that this assault was aggravated by appellant's use of his hand as a deadly weapon. Clearly, bodily injury assault in the manner alleged, but without the deadly weapon, is a lesser included offense of the alleged aggravated bodily injury assault. *See Jones v. State*, 241 S.W.3d 666, 671 (Tex. App.--Texarkana 2007, no pet.). The question then becomes whether there is evidence in the record that would permit a rational finding that appellant strangled Dukes with his hand, but that he did not use or intend to use his hand in a manner capable of causing death or serious bodily injury. *See* Tex. Penal Code Ann. § 1.07(a)(17)(B) (West Supp. 2008) (defining "deadly weapon"). We find that there is not.

The State argues that "there was testimony, both for and against the proposition that the Appellant's hands were used as a deadly weapon." The State does not, however, refer us to any specific evidence indicating that appellant did not use his hand as a deadly weapon. Appellant obviously did not kill Dukes, and the State may be arguing that her injuries were not serious. But the statutory definition of "deadly weapon" does not require that death or serious bodily injury be inflicted or even

intended by the actor. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000). If it is the State's argument that the jury might have disbelieved crucial evidence regarding appellant's use of his hand as a deadly weapon, this is not sufficient to justify the lesser included offense instruction. There must be some evidence directly germane to the lesser included offense before a lesser included offense instruction is warranted. *Hampton v. State*, 109 S.W.3d 437, 440 (Tex. Crim. App. 2003).

An object is a deadly weapon if the actor intends a use of the object in which it would be capable of causing death or serious bodily injury. *McCain*, 22 S.W.3d at 503. In his statement to the police, appellant said that he used his hand to apply pressure to the "pulse points" in Dukes's neck with the intent "to make her dizzy so she would be knocked off balance." The evidence reflects that appellant accomplished this purpose. Dukes testified that appellant choked or strangled her with his hand with such force that she was unable to breathe and lost full consciousness. Olufs, the paramedic, testified that Dukes suffered "significant" injuries. Olufs also testified that a person using his hands to strangle another person could cause death from asphyxiation in three to four minutes. All of the evidence supports the conclusion that appellant intended to use his hand in a manner capable of causing death or serious bodily injury.

The State also argues that appellant raised the lesser included offense by asserting that he acted in self-defense and by suggesting that Dukes's injuries

were caused by him pulling on her necklace or by her fall from the porch. A self-defense claim, however, implicitly admits the elements of the alleged offense. *See VanBrackle v. State*, 179 S.W.3d 708, 715 (Tex. App.--Austin 2005, no pet.). Appellant's claim that he justifiably strangled Dukes in self-defense did not raise an issue as to whether or not he used his hand as a deadly weapon.[2] *See Jones*, 241 S.W.3d at 671-72 (holding in prosecution for aggravated bodily injury assault with deadly weapon that defendant's self-defense claim did not entitle him to instruction on simple assault). As for the possibility that Dukes may have been injured in some other way than by appellant strangling her with his hand, these other possible theories were not included within the offense charged. The indictment alleged that appellant injured Dukes by strangling her with his hand. Bodily injury assault inflicted by pulling Dukes's necklace or by causing her to fall from the porch was not included within the elements of aggravated bodily injury assault as they were alleged and modified in the indictment. *See Irving v. State*, 176 S.W.3d 842, 845-46 (Tex. Crim. App. 2005) (holding that simple assault by grabbing or falling on complainant was not lesser included offense of aggravated assault by striking complainant with baseball bat); *see also Hall*, 225 S.W.3d at 535-36.

---

[2] The court's charge instructed the jury on the use of force in self-defense.

Finally, the State argues that appellant's contention on appeal does not comport with his objection at trial. Defense counsel voiced appellant's objection to the lesser included offense instruction as follows:

> I would object to the lesser-included offense of misdemeanor assault being included. The reason is because of the strangled. There is no definition. The definition is to cause death.[3] A lesser included is we strike elements or facts in and see if we have another lesser offense. We strike deadly weapon, well, now we have strangled indicating death of a misdemeanor.

We agree with the State that counsel appeared to be chiefly concerned with the absence of his proposed definition of "strangled." Nevertheless, the objection made it clear that appellant was opposed to the lesser included offense instruction being given.

We hold that the trial court erred by instructing the jury on the lesser offense of simple bodily injury assault. Appellant was harmed because he was found guilty of an offense that, under the evidence, was not a valid, rational alternative to the offense

---

[3] Counsel had previously asked the court to instruct the jury that "strangulation" means "cutting off a person's capacity to breathe by force to the windpipe to the death." This instruction was refused.

for which he was on trial. *See Arevalo*, 943 S.W.2d at 899. Appellant's first point of error is sustained. Because of our resolution of this point, we need not address appellant's second and third points of error.

Appellant cannot be retried for aggravated bodily injury assault because the jury's verdict convicting him of the lesser offense operates as an acquittal of the greater offense. *See Hampton*, 165 S.W.3d at 694. But our holding that the evidence did not raise an issue as to whether appellant was guilty only of simple assault does not mean that the evidence adduced at the trial was insufficient to support appellant's conviction for that offense. Therefore, the appropriate remedy for the trial error is to retry appellant for simple bodily injury assault. *Id.*

The judgment of conviction is reversed and the cause is remanded to the trial court.

W. Kenneth Law, Chief Justice

Before Chief Justice Law, Justices Pemberton and Waldrop

Reversed and Remanded

Filed: November 14, 2008

Publish